

# ***Williams v. General Motors Corporation:*** **Giving Sexual Harassment Plaintiffs a Chance**

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*Title VII was enacted in part to help women combat the problems of sexual discrimination and harassment in the workplace. The statute was designed to provide protection and remedies for women who found themselves in hostile work environments. However, the courts disagree as to both what should be considered a hostile work environment and the types of conduct that create a hostile work environment. One source of this conflict is whether the hostility of a work environment ought to be determined relative to the general type of work environment—that is, whether it ought to be harder for a woman to show harassment in a coarse, blue-collar work environment than in a more pristine, white-collar environment. Another source of conflict is whether non-sex, but nevertheless gender-based, behavior ought to be allowed to support a Title VII claim. The author argues that because Title VII's broad remedial purpose is supposed to protect individuals from discrimination because of their sex, their general type of work environment ought to be irrelevant, and non-sex, gender-based behavior ought to be allowed to show discrimination because of sex. The author concludes that the Sixth Circuit's recent decision refusing to take general work environment into account and allowing a showing of non-sex behavior when considering Title VII claims is the approach that best fulfills Title VII's purpose.*

## I. INTRODUCTION

A woman works for a road construction company and is sexually harassed.<sup>1</sup> The woman is called vulgar names<sup>2</sup> and endures rude treatment during a typical workday because of her gender.<sup>3</sup> A court agrees that the environment is crude and vulgar.<sup>4</sup> However, because a construction environment is rough and the woman “chose” to work in that particular environment, the court does not validate her

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\* I want to dedicate this article to my family who has provided endless support throughout my law school career. I would like to especially thank my husband, Rick Vanover, and my mother, Connie Cravens, for their support and encouragement.

<sup>1</sup> See *Gross v. Burggraf Construction Co.*, 53 F.3d 1531 (10th Cir. 1995).

<sup>2</sup> *Id.* at 1535 (showing that the supervisor called the female plaintiff such names as “dumb” and “cunt” and used other profanity in reference to her).

<sup>3</sup> *Id.* (showing one example in which the supervisor asked one of the woman's co-workers over the CB radio, which could be heard by all of the employees, “Mark, sometimes don't you just want to smash a woman in the face?” referring to the female plaintiff).

<sup>4</sup> See *id.* at 1538. The claim is evaluated in the context of a rough blue-collar environment. *Id.*

sexual harassment claim.<sup>5</sup> Furthermore, because much of the harassment was non-sexual in nature, the court found that the woman's Title VII sexual harassment claim could not stand.<sup>6</sup> This example shows how many circuits do not allow sexual harassment claims to stand because of their positions regarding whether the type of work environment and non-sex behavior should be taken into account.<sup>7</sup> Other circuits, however, such as the Sixth Circuit in *Williams v. General Motors Corp.*, are giving sexual harassment plaintiffs the full protection of Title VII by not taking into account work environment and allowing non-sex behavior to support a Title VII claim.<sup>8</sup>

Sexual harassment is a serious problem.<sup>9</sup> As many as half of all women will be harassed during their careers.<sup>10</sup> Work productivity declines because victims of sexual harassment are affected both physically and psychologically.<sup>11</sup>

Congress originally enacted Title VII to protect minorities in the workplace; gender was added to Title VII in an attempt to defeat the bill.<sup>12</sup> Thus, early in

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<sup>5</sup> See *infra* notes 68–73 and accompanying text (discussing of the court's views with regard to work environment).

<sup>6</sup> See *infra* notes 119–22 and accompanying text (discussing the court's views with regard to non-sex behavior).

<sup>7</sup> See *infra* notes 47–139 and accompanying text (discussing the different circuits' views on work environment and non-sex behavior and how their views affect women in our working society).

<sup>8</sup> See also discussion *infra* on pages 5–10 regarding the Sixth Circuit's stand on the work environment and non-sex behavior issues.

<sup>9</sup> See, e.g., Michelle Ridgeway Pierce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1071 (1989); Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1258 (1987) (stating that sexual harassment of women is a “widespread, insidious problem”).

Sexual harassment can cause physical and psychological illness to the victim. Furthermore, sexual harassment victims, their families, and the United States economy suffer. The losses are incurred by American companies due to “absenteeism, lower productivity, and employee turnover, that is, the costs of rehiring and retraining when talented staff leave because of harassment.” See ELLEN BRAVO & ELLEN CASSEDY, *THE 9TO5 GUIDE TO COMBATING SEXUAL HARASSMENT: CANDID ADVICE FROM 9TO5, THE NATIONAL ASSOCIATION OF WORKING WOMEN* 41–50 (1992).

<sup>10</sup> Pierce, *supra* note 9, at 1071 (citing B. GUTER, *SEX AND THE WORKPLACE* 44 (1985)). Even though there have been reports to the Bureau of National Affairs of women sexually harassing men and same sex situations, “[t]ypically a female employee files a complaint against a male co-worker.” *Id.*

<sup>11</sup> *Id.* (noting that because a victim of sexual harassment suffers both physically and psychologically, job performance of the victim is often impaired).

<sup>12</sup> See, e.g., *id.* at 1072, 1075–76. In an attempt to defeat the bill, the word “sex” was added to the list of protected categories by Representative Howard Smith, an opponent of the

Title VII history, courts did not construe Title VII to protect victims of sexual harassment.<sup>13</sup> Later, courts finally recognized sexual harassment, but only in quid pro quo situations.<sup>14</sup> Today, courts also recognize hostile work environment sexual harassment.<sup>15</sup> Overall, there is still confusion between the courts as to what

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bill. Because of this, there is little legislative history to guide the courts when it comes to sexual harassment. *See id.*

<sup>13</sup> *Id.* at 1073 (noting that courts did recognize that sexual harassment was a problem, but contended that Title VII did not protect victims of sexual harassment). *See, e.g., Barnes v. Costle*, 561 F.2d 983, 983 (D.C. Cir. 1977). By the late 1970's, courts began to recognize claims of sexual harassment. *See Pierce, supra* note 9, at 1073 n.21.

<sup>14</sup> *See Pierce, supra* note 9 at 1073. Quid pro quo sexual harassment occurs when a woman submits to a supervisor's sexual demands. The sexual favors become a condition of the victim's employment status. Supervisors, but not co-workers, can be liable for quid pro quo sexual harassment because courts see only supervisors as having the power and ability to make sexual favors a condition of employment. *See Anderson, supra* note 9, at 1260–61.

An employer may be liable if a supervisor is the sexual harasser in a Title VII sexual harassment case. The "employer is subject to vicarious liability . . . created by a supervisor with immediate or successively higher authority over the employee . . ." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 742 (1998). However, if an employee under sexual harassment has suffered no tangible job consequences as a result of the supervisor's actions, then the employer may raise an affirmative defense to liability. *Id.* at 765. To use this defense, the employer must show that he exercised reasonable care to prevent and correct any sexually harassing behavior and that the employee was unreasonable in not taking advantage of any "preventative or corrective opportunities" provided by the employer. *Id.*; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

Overall, if an employer reacts swiftly and appropriately to a victim's complaint of supervisor harassment, the court should not find the employer liable. If an employer is found liable in such an instance, Title VII's deterrent policy is undermined. Furthermore, under an agency analysis, when the employer quickly stops the harassment, any semblance of authority that the harasser may have had is eradicated. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 266 (5th Cir. 1999) (analyzing *Faragher*, 524 U.S. at 791–92, 801).

<sup>15</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986); *Pierce, supra* note 9, at 1075. The Court in *Harris v. Forklift Systems Inc.* stated that the workplace must be "permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." 510 U.S. 17, 21 (1993) (citing *Meritor*, 477 U.S. at 65, 67). A hostile work environment can be created by either a supervisor or a co-worker. *See Anderson, supra* note 9, at 1260–62.

Whether sexual harassment is quid pro quo or hostile work environment makes no difference in the standard for employer liability. These two types of harassment are only relevant to the question of whether a plaintiff proves a violation of Title VII. *Brown v. Perry*, 184 F.3d 388, 394 (4th Cir. 1999) (construing *Burlington*, 524 U.S. at 751). *See supra* note 14 (describing the standard for employer liability if the harasser is a supervisor).

However, an employer may be liable for the sexual harassment of its workers "where its own negligence is a cause of the harassment . . . if it knew or should have known about the conduct but failed to stop it." *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) (citing *Burlington*, 524 U.S. at 759).

extent sexual harassment claims should be successful because of differing views on such issues as work environment and non-sex behavior.

In *Williams v. General Motors Corp.*,<sup>16</sup> a case decided under a hostile work environment claim, the Sixth Circuit decided two issues that are sources of controversy with regard to a sexual harassment claim: (1) whether an employee's work environment should be included in the analysis, and (2) whether non-sex behavior can be used to prove a sexual harassment claim.<sup>17</sup> This case provides the focal point for analysis of these pivotal issues in sexual harassment hostile work environment claims. It should be noted that most cases regarding Title VII sexual harassment look at only one of the two issues discussed in this note—work environment or non-sex behavior. However, *Williams* is unique in that it decides both issues. In Part II, an in-depth analysis of *Williams* provides the basis to explain why work environment should not be considered and why non-sex behavior should be considered in a hostile work environment claim. In Part III, I set out the split among the courts concerning work environment, while in Part IV, I discuss the split concerning non-sex behavior. In Part V, I explain why courts should follow the lead of *Williams* in not allowing work environment to be taken into account while allowing non-sex behavior to be considered in hostile work environment sexual harassment cases.

## II. *WILLIAMS V. GENERAL MOTORS CORP.*

The Sixth Circuit decided that the plaintiff in *Williams* created a question of material fact with regard to her sexual harassment hostile work environment claim.<sup>18</sup> Before remanding the case, the court established two important and controversial guidelines for the lower court to follow.<sup>19</sup> The *Williams* court decided that the particular type of work environment should not be considered

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Five prongs must be met in order for the plaintiff to establish a prima facie case in a hostile work environment claim. First, the plaintiff must prove that she was a member of a protected class. Second, she must show that she was subject to unwelcome sexual harassment. Third, the harassment must be based on her sex. Fourth, the harassment must have created a hostile work environment. Finally, the plaintiff must prove that the supervisor's actions were foreseeable or within the scope of the employee's employment and that the employer did not adequately respond. *See, e.g., Williams v. General Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999).

In this article I focus on the third and fourth prongs: whether the particular type of work environment can be taken into account when deciding if an environment is hostile, and whether non-sex behavior harassment can be based on the victim's sex.

<sup>16</sup> 187 F.3d 553 (6th Cir. 1999).

<sup>17</sup> *See id.* at 553.

<sup>18</sup> *Id.* This case came to the Sixth Circuit Court of Appeals after the United States District Court for the Northern District of Ohio granted summary judgment in favor of the defendant, General Motors Corporation. *Id.*

<sup>19</sup> *See id.*

when deciding whether a certain environment is hostile and that non-sex behavior can be used to support a hostile work environment claim.<sup>20</sup>

The plaintiff in *Williams* worked the midnight shift in the crib, a warehouse for storing materials used in a plant of the General Motors Corporation. The plaintiff claimed that the sexual harassment she experienced consisted of both sexual and non-sexual behavior. For instance, she alleged many instances of sexual harassment including offensive language, sexual remarks, and a number of practical jokes being played against her. In addition, the plaintiff claimed she was denied access to certain areas and denied breaks.<sup>21</sup> The plaintiff filed suit alleging hostile work environment sexual harassment.<sup>22</sup>

### A. Work Environment

The *Williams* court rejected the Tenth Circuit's position in *Gross v. Burggraf Const. Co.*,<sup>23</sup> which took into account a blue-collar working environment. The *Gross* standard requires more sexual harassment in rough environments than pristine work environments in order to have a claim under Title VII.<sup>24</sup> The Sixth Circuit claimed that the same behavior, which would be considered sexual harassment in a more refined atmosphere, should also be considered sexual harassment in a less refined atmosphere regardless of whether sexually harassing behavior is expected of workers in a less refined environment. *Williams* stressed that just because a woman chooses to work in a rougher environment does not mean that she relinquishes her sexual harassment claims under Title VII.<sup>25</sup> The *Williams* court felt that a woman in a vulgar work environment has just as much right to bring a sexual harassment claim as a woman in a more polite

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<sup>20</sup> *Id.* at 553, 564–65.

<sup>21</sup> *Id.* at 559. Offensive remarks included swear words and addressing plaintiff as “slut.” Many sexual comments were made to the plaintiff such as “you can rub up against me anytime” and “you can back right up to me” while the plaintiff was bending over to pick up some supplies. Further, while the plaintiff was writing “Hancock Furniture Company,” a co-worker stated “you left the dick out of the hand.” *Id.* The plaintiff alleged that she was forced to take the midnight shift, was denied overtime, was the only employee denied a break, was the only employee not to have a key to the office, and was not allowed to sit by the window in the crib. Practical jokes included gluing plaintiff's toolbox to her desk, padlocking the plaintiff in the crib, and blocking plaintiff's way with materials, including buggies (motorized carts which were used to haul supplies). Also, co-workers threw items at the plaintiff. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 53 F.3d 1531 (10th Cir. 1995).

<sup>24</sup> *Williams*, 187 F.3d at 564 (rejecting *Gross*, 53 F.3d at 1538).

<sup>25</sup> Actually, the Sixth Circuit found that the Tenth Circuit's view is illogical because it meant that the more hostile the environment, the harder it would be to win a Title VII hostile work environment claim. The Sixth Circuit held that women in a working trade deserve no less protection than women in other trades. *Id.* at 564.

environment. Thus, the court in *Williams* looked to the surrounding circumstances without regard to whether the environment is more or less refined.

The *Williams* court reasoned that the type of work environment does not have to be considered in a sexual harassment case because other factors under Title VII allow a court not to enforce the forbidden "general civility code." The Sixth Circuit held that tests given under the Supreme Court's decision in *Oncale v. Sundowner Shores Services, Inc.*<sup>26</sup> prevent the imposition of a general civility code. Thus, according to *Williams*, under *Oncale*, the Tenth Circuit's attempt to take environment into account is unnecessary.<sup>27</sup>

## B. Non-Sex Behavior

*Williams* shows that non-sex behavior can be sexually harassing. The "based on sex" prong of a hostile work environment claim<sup>28</sup> does not require sexual conduct if pranks or other non-sex behavior evinces an "anti-female animus."<sup>29</sup> This means that a sufficient showing of "anti-female animus" needs to be demonstrated to prove that non-sexual conduct is sexually harassing. To show that such conduct is based on sex, a plaintiff must simply show that the conduct was based on her sex, or in other words, the conduct occurred because she is a woman.<sup>30</sup> Therefore, the co-worker's pranks, such as gluing the plaintiff's toolbox to her desk, could be included in her sexual harassment claim if she could show that the toolbox was glued to her desk because she was a woman.<sup>31</sup> Therefore, the *Williams* approach allows more instances of conduct to be included in a plaintiff's sexual harassment hostile work environment claim.<sup>32</sup>

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<sup>26</sup> 523 U.S. 75 (1998).

<sup>27</sup> Under *Harris v. Forklift Systems*, one of the issues that the plaintiff must prove is that the plaintiff experienced sexual harassment by both subjective and objective standards. 510 U.S. 17, 21 (1993). In this way, in order to prove the objective standard, a plaintiff must show that other people in her situation would find the work environment sufficiently hostile. See *Williams*, 187 F.3d at 564.

<sup>28</sup> See *supra* note 15 (discussing the prongs that need to be satisfied in order to have a successful hostile work environment claim).

<sup>29</sup> *Williams*, 187 F.3d at 565 (quoting *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 905 (1st Cir. 1988)).

<sup>30</sup> See *id.* at 656 (citing, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

<sup>31</sup> The Sixth Circuit stated that the plaintiff could prove that the pranks were based on her sex by looking at other instances in which the plaintiff was treated differently because of her gender. See *Williams*, 187 F.3d at 565–66. Thus, circumstantial evidence can be shown to prove that the behavior was because of the plaintiff's sex.

<sup>32</sup> *Williams* has already been cited for its proposition regarding non-sex behavior. See, e.g., *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 941–42 (6th Cir. 2000); *Brown v.*

### C. Oncale's Impact on Circuit Decisions

The Supreme Court's decision in *Oncale*<sup>33</sup> needs to be briefly addressed as circuits are citing *Oncale* with regard to whether a particular type of work environment should be taken into account in a Title VII sexual harassment claim. Furthermore, courts on both sides of this work environment issue are citing *Oncale* for support.<sup>34</sup> The case addressed whether people could be sexually harassed by members of the same sex. However, dicta in the case suggests answers for dealing with work environment in a Title VII sexual harassment claim. While looking at *Oncale* with regard to work environment, I also discuss what effect the spirit of *Oncale* should have with regard to the issue of non-sex behavior and sexual harassment claims. The Supreme Court held in *Oncale* that same-sex sexual harassment is actionable under Title VII<sup>35</sup> and that social context should be taken into account in a common sense way to "enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex . . . ."<sup>36</sup> The Court, overall, emphasizes looking to work environment to

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Columbus Mun. Airport Auth., 210 F.3d 371, 371 n.1 (6th Cir. 2000); *Whitaker v. Mercer County*, 65 F. Supp.2d 230, 242 (D.N.J. 1999).

For a further summary of *Williams*, see the following article: J. Kirby Fowler, Jr. & Pamela J. White, *Recent Developments in Employment Law*, 35 TORT & INS. L.J. 263, 270-71 (Winter 2000).

<sup>33</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

<sup>34</sup> Courts are still split with regard to work environment after *Oncale*. The Tenth Circuit, citing *Oncale*, continues to follow its prior decisions taking work environment into account. See *Pascouau v. Martin Marietta Corp.*, 185 F.3d 874, 878 (10th Cir. 1999). The Eighth Circuit also takes work environment into account and cites to *Oncale* in making this determination. See *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958 (8th Cir. 1999). Furthermore, the Fifth Circuit changed its position since *Oncale* and, although noting that the thrust of *Oncale* involved same-sex sexual harassment, cites to *Oncale* for the reason it changed. See *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir. 1999). The Fifth Circuit only looks to work environment to distinguish between teasing and harassment, not to show, like the Tenth and Eighth Circuits, that the environment was sexually charged, which makes a Title VII case difficult to prove. Overall, at least some courts feel that *Oncale* was a proposition by the Supreme Court that a particular work environment should be taken into account, making it more difficult for a woman who works in a rough environment to have a claim under Title VII.

However, the Sixth Circuit in *Williams* cites *Oncale* when discussing its position on work environment, namely that the particular type of work environment should not be taken into account when deciding whether the plaintiff has a successful sexual harassment claim under Title VII. See *Williams*, 187 F.3d at 564.

<sup>35</sup> *Oncale*, 523 U.S. at 76 ("This case presents the question whether workplace harassment can violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex' . . . when the harasser and the harassed employee are of the same sex.").

<sup>36</sup> *Id.* at 82. The Court emphasized that Title VII is not a "general civility code" and that Title VII involves only behavior that alters the conditions of the victim's employment. However, the Court again explained this assertion in the context of same-sex sexual

understand the social relations between the different actors; however, the Court does not suggest that the particular type of work environment should be taken into account when deciding what is and is not sexual harassment under Title VII.<sup>37</sup> In any case, the guidance was given in dicta and courts are still deciding these issues in both directions.<sup>38</sup>

After *Oncale* was decided, the Sixth Circuit in *Williams* declared that non-sex behavior could be used to assert a sexual harassment claim, as long as the plaintiff could show that the non-sex behavior was because of sex.<sup>39</sup> Even though the

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harassment. *See id.* (emphasizing that social context should be taken account of and using the example that a football player smacking another on the buttocks is not sexual harassment).

Some scholars purport that even though the Court asserts that Title VII is not meant to force a civility code, the Court in *Oncale*, by its reasoning, actually allows the Court to ignore a particular type of work environment and take on the role of “manners police.” *See* Dabney D. Ware & Bradley R. Johnson, *Oncale v. Sundowner Offshore Services, Inc.: Perverted Behavior Leads To A Perverse Ruling*, 51 U. FLA. L. REV. 489, 490 (1999). In this way, to prove sexual harassment, one does not have to look at work environment, namely how others were treated, in order to have a successful claim. *See id.* at 501. It is argued that if one does not have to look to how others were treated in a particular environment, the only thing left is overall social norms. Therefore, *Oncale* allows the courts to take the role of “manners police” without the need to look at a particular work environment despite language to the contrary in the *Oncale* decision. *See id.* at 504.

<sup>37</sup> The Court states that juries should look at context in order to “distinguish between simple teasing or roughhousing among members of the same sex, and [to find] conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.” *Oncale*, 523 U.S. at 82. Furthermore, the Court states that the work environment is to be used to look to the “expectations” and the “relationship” between the co-workers in the environment. *See id.* In this way, one may assume that social context is looked at only to see if the plaintiff was actually harassed instead of teased and not to determine if the plaintiff’s choice of a rough blue-collar working environment makes the plaintiff somehow deserve the harassing conduct. Thus, *Oncale* does not suggest simply looking to the *type* of work environment in place—such as putting a label on the environment as rough or refined, but actually looking to the interaction of the co-workers and the interaction between the plaintiff and the harasser. This assertion can be seen by the example given in *Oncale* concerning work environment: If a coach smacks a football player on the buttocks, sexual harassment has not taken place. However, if the secretary of the coach, an employee in the same work environment, smacks a football player on the buttocks, sexual harassment may have taken place. *Id.* In the end, *Oncale* wants there to be a safeguard; the central question when looking at work environment becomes: Was this teasing or roughhousing or was this sexual harassment? This question is answered by examining the relationship between the harasser and the plaintiff in the work environment and does *not* consist of labeling the work environment to be of a specific type and thus making the standard for proving sexual harassment higher or lower depending on the label assigned to the work environment.

<sup>38</sup> *See supra* notes 18–32 and accompanying text for specific details regarding *Williams*.

<sup>39</sup> *See Williams*, 187 F.3d at 553. Even after *Oncale*, the Tenth Circuit continues to decide cases in which non-sex conduct is barred from supporting a Title VII claim. *See Shoemaker v. Nat’l Mgmt. Res. Corp.*, 141 F.3d 1185 (10th Cir. 1998); *Turner v. Reynolds Ford, Inc.*, 145



Sixth Circuit does not cite to *Oncale*, it follows the spirit of *Oncale* regarding non-sex behavior.<sup>40</sup> This is because *Oncale* insists on a broad interpretation of the behavior allowed as evidence in a Title VII sexual harassment claim, and *Oncale* states that what is most important in bringing a successful sexual harassment claim is to show, regardless of what type the harassment is, that the harassment was “because of sex.”<sup>41</sup> Therefore, *Williams* agrees with the spirit of *Oncale* in that non-sex behavior can be used in a Title VII claim either as supporting other

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F.3d 1346 (10th Cir. 1998). Furthermore, the Tenth Circuit still uses strong language requiring the conduct to be “overtly sexual” in nature. *See Turner*, 145 F.3d at 1346. In this way, not only does the Tenth Circuit go against the spirit of *Oncale* concerning non-sexual behavior, but also goes a step further. The Tenth Circuit does not allow behavior that is sexual in nature to support a Title VII claim if the behavior is not “clearly sexual.” The Tenth Circuit, which cites to *Oncale*’s dicta to support its work environment position, ignores the spirit of *Oncale* when looking at non-sex behavior—not even acknowledging *Oncale*’s broad construction of what is considered sexual harassment.

<sup>40</sup> *See Williams*, 187 F.3d at 566 (urging that the law does recognize non-sex behavior and cites to other circuits who have taken the same position on non-sex behavior before *Oncale* was decided).

<sup>41</sup> *Oncale*, 523 U.S. at 78. First, the Court reasoned that Title VII “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.” *Id.* Therefore, in order to do justice to Title VII, it should be construed broadly, giving same-sex sexual harassment equal protection under the law. It is important to note, however, that the plaintiff involved in *Oncale* was harassed only by conduct that was sexual in nature. *See id.* (showing that the plaintiff was subjected to sexual humiliation in front of co-workers and that the plaintiff was assaulted in a sexual manner and threatened with rape).

Second, the Court clearly states in dicta that a harasser’s motivation to harass need not be sexual in nature. “But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” *Id.* at 79. But the Court spoke of this assertion in terms of same-sex sexual harassment, although the Court did not specifically limit this assertion to same-sex sexual harassment. *See id.*

Third, the Court states that the critical issue in a sexual harassment case is whether the plaintiff was harassed because of sex. “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Id.* (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993)). Thus, the Court neutrally states that terms and conditions of employment must only be experienced by one sex, however, the Court does not state that these terms and conditions must be sexual in nature.

Further, the Court states that *typically* sexual harassment is shown with “explicit or implicit proposals of sexual activity.” *Id.* On the other hand, the Court does not mandate that all claims must show harassment of a sexual nature. As a matter of fact, the Court seems to accept the idea that the harassment involved may not follow the *typical* case and thus a plaintiff may still have a claim of sexual harassment without evidence of harassment that is sexual in nature. Overall, *Oncale* simply requires that the harassment in question be based on sex. *See id.*

instances of sexual conduct towards the plaintiff or as evidence of harassment without any sexual behavior accompanying the non-sex conduct.<sup>42</sup>

The Sixth Circuit strongly asserts its position that “judgments by the court as to a woman’s assumption of risk upon entering a hostile work environment are improper.”<sup>43</sup> Despite the fact that other circuits have interpreted *Oncale* with regard to work environment differently, the Sixth Circuit, actually citing *Oncale*, asserts that the atmosphere of a particular work environment is not to be taken into account under Title VII. The Sixth Circuit reasons that looking at a work environment is unnecessary because the objective test of whether a reasonable person would feel that the behavior was sexual harassment, which every court considers, prevents Title VII from becoming a civility code. Thus, the Sixth Circuit understands the “civility code” reasoning in *Oncale* in light of the objective test set forth by the Supreme Court.<sup>44</sup> In this way, the “civility code” does not extend to each and every work environment, but rather deals with not making employers in general live up to an ideal standard set by the court, which is unattainable in practicality. The *Williams* court goes on to say that while courts may want to look to a social setting to distinguish between teasing and harassment, a court should never assume a woman enters a rough workplace on her own and thus deserves what she gets.<sup>45</sup>

Therefore, if the workplace is to be looked at all, it cannot be considered to show that a woman took the risk of harassment by accepting a job in a rough environment, or that women in rough, blue-collar type environments need to endure more harassment just to have a claim equal to those of other women in better environments. As a result, the Sixth Circuit after *Oncale* made its position clear: the type of work environment involved cannot be considered when deciding a hostile work environment claim.

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<sup>42</sup> *Williams* did not explicitly elaborate about what is needed to prove that non-sex behavior was because of gender, but one can assume that circumstantial evidence showing that the conduct was based on sex is all that is needed to bring a Title VII claim under *Williams*. This is because *Williams* asserted that the circumstantial evidence presented by the plaintiff was enough to show that the non-sex conduct was based on sex. *See Williams*, 187 F.3d at 533. In *Williams*, the fact that the plaintiff was ostracized when other male co-workers were not and subjected to gender-specific epithets demonstrated that the behavior was based on sex. *See id.* at 565–66. These instances show, according to the Sixth Circuit, that the non-sexual behavior, such as gluing tools to the plaintiff’s desk, was based on sex, even though the conduct was non-sexual in nature. *See id.*

<sup>43</sup> *See Williams*, 187 F.3d at 556.

<sup>44</sup> *See id.* at 564.

<sup>45</sup> *See id.*

#### D. Overall Impact of Williams

Overall, *Williams* made it easier for plaintiffs to bring a sexual harassment suit under Title VII. First, *Williams* gives blue-collar workers the same protection as white-collar workers. Second, *Williams* allows a plaintiff to add non-sexual instances to a claim, which can add to the strength of the plaintiff's claim. Thus, circuits that follow the reasoning in *Williams* give more success to Title VII plaintiffs bringing a hostile work environment claim than circuits that do not agree with *Williams* on these two issues.

### III. THE SPLIT AMONG THE COURTS CONCERNING WORK ENVIRONMENT

There is a split among the courts as to whether the particular type of work environment should be considered in a hostile work environment sexual harassment claim. Some courts believe that if a woman chooses to enter or stay in a work environment that is known to be rough and sexually harassing, the woman does not have as strong of a claim under Title VII as a woman who chooses to work in an environment that is perceived to be wholesome and without sexual harassment. Other courts believe that work environments saturated with sexual harassment are exactly what Title VII was intended to eradicate and thus do not take the type of work environment atmosphere into account when deciding if there is a claim under Title VII.

#### A. Courts That Do Not Take Work Environment Into Account

Some courts do not take a particular work environment into account when deciding if a sexual harassment claim under Title VII exists. In other words, the court only looks at the circumstances of the harassment and divorces these circumstances from the overall wholesomeness or rudeness of a particular work environment. In addition to the Sixth Circuit, the Fifth Circuit and the Seventh Circuit have also decided not to take work environment into account.<sup>46</sup>

##### 1. Fifth and Sixth Circuits—Polluted Work Environments Are What Title VII Was Meant to Cure

In 1989, before the Sixth Circuit decision in *Williams*, the Fifth Circuit declared that work environment would be ignored in *Wyerick v. Bayou Steel Corp.*<sup>47</sup> The plaintiff in *Wyerick* worked as a crane operator on the night shift.

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<sup>46</sup> See, e.g., *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271 (5th Cir. 1989); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995).

<sup>47</sup> 887 F.2d at 1271. It is important to note that this case was brought under Louisiana Revised Statute § 23:1006, an analog to Title VII. However, the way in which the sexual

After complaining about the type of care she received in the doctor's office of the plant, the plaintiff became the target of numerous sexual remarks.<sup>48</sup> Sexual comments were made both by co-workers and supervisors on a daily basis.<sup>49</sup> Often over the factory radio system, sexual talk was used. Further, the work environment was charged with sexual nuances and games.<sup>50</sup> The plaintiff reported the incidents, but no direct action was taken by Bayou Steel Corporation.<sup>51</sup>

The Fifth Circuit remanded the claim, holding that the district court's summary judgment could not be upheld since the district court took work environment into account. The Fifth Circuit clearly stated that "work environments 'heavily charged' or 'heavily polluted' with racial or sexual abuse are at the core of the hostile work environment theory."<sup>52</sup> Therefore, if an environment is heavily charged with sexual innuendo, a Title VII claim is not barred, but welcomed. The Fifth Circuit felt that work environments that are rough and sexually explicit are not to be rejected because of the atmosphere, but that Title VII, as well as the comparable Louisiana state statute, were made to embrace and correct such situations.<sup>53</sup> To this day, *Wyerick* has not been overturned.<sup>54</sup>

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harassment claim was dealt with has important ramifications for all sexual harassment claims in the Fifth Circuit. See *id.* at 1271, 1274. Louisiana courts in the past have decided that their state statute is "similar in scope" to Title VII and look to Title VII for guidance. The same five factor test is used in the Louisiana statute and Title VII. See *supra* note 15 for a discussion of the five factors used in deciding hostile work environment harassment claims.

<sup>48</sup> *Id.* at 1272. The plaintiff, while on her shift on June 28, 1987, had chest pain and difficulty breathing. She went to the first aid station for treatment and later complained about the quality of the services to supervisors and fellow employees. *Id.*

<sup>49</sup> See *id.* and *supra* note 2. The comments were made over the radio and in person. Comments included remarks about the plaintiff's breasts, male co-workers having a "hard on," performing "mouth-to-mouth," and calling the plaintiff names such as "fucking bitch." *Id.*

<sup>50</sup> *Id.* Terminology over the radios included sexual connotations such as "stick it in" and "how deep is it." The court found relevant that the plaintiff did admit that there were a few times when she retorted with a sexual comment because the facts showed that she participated and accepted the environment and thus the harassment was not unwelcome. *Id.* at 1272, 1275.

<sup>51</sup> See *id.* at 1272-73. The plaintiff complained to her employer, and the employer recognized the harassment but took no steps to rectify it, even though plaintiff's employer promised her that immediate action would be taken. *Id.*

<sup>52</sup> *Id.* at 1275 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986)).

<sup>53</sup> See *id.*

<sup>54</sup> Even though *Wyerick* has not been overturned, the Fifth Circuit has changed its reasoning in this area. See *infra* notes 83-87 and accompanying text.

## 2. Seventh Circuit—Not Distinguishing Between Environments in Deciding Title VII Sexual Harassment Cases

The Seventh Circuit has not explicitly agreed with the Fifth and Sixth Circuits, but when deciding whether a work environment was hostile, the Seventh Circuit has not distinguished between different types of working environments. Instead, the court spelled out a test that applies to all work environments, regardless if the environment is pristine or filled with sexual comments and conduct. The test, articulated in *Baskerville v. Culligan International Co.*,<sup>55</sup> allows the jury to decide on which side of the “line” conduct falls—the “line between a merely unpleasant working environment . . . and a hostile or deeply repugnant one on the other.”<sup>56</sup>

The court developed a test for all working environments, which does not take into account the atmosphere of any particular work environment. Thus, even though the Seventh Circuit did not state that work environment is not to be considered, one can infer that the Seventh Circuit does not look to this behavior because its test does not find the atmosphere of a work environment to be important. Since the *Baskerville* decision, the Seventh Circuit has not looked at work atmosphere as a factor in its analysis of sexual harassment claims. Therefore, the Seventh Circuit is essentially in agreement with the Sixth Circuit in *Williams*.

### B. Courts that Take Work Environment into Account

The Tenth Circuit is the leading proponent of the position that a plaintiff who chooses to work in an environment that is sexually hostile accepts that

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<sup>55</sup> 50 F.3d 428 (7th Cir. 1995). The plaintiff in *Baskerville* was a secretary for a manufacturing plant, and her supervisor made numerous sexual comments to her and called her “pretty girl” and “tilly.” Further, the plaintiff’s supervisor made such comments as “um um um” when the plaintiff turned to leave; told her the office was hot once she stepped into it; that his wife told him to think of the plaintiff as Anita Hill; and that she and the supervisor must have been dancing in his office because it was smoky. Further, the plaintiff’s supervisor made motions with his hand in a way to suggest masturbation. *Id.* at 430.

<sup>56</sup> *Id.* at 430–31 (stating that this is not a “bright line” test). Although the Seventh Circuit in dicta refused to treat a blue-collar working environment differently from a white-collar environment, the jury verdict in favor of the plaintiff was overturned. The court found that the employer took all reasonable steps necessary to stop the harassment, and the comments were sparse and spread out over a course of seven months. *Id.* at 428, 431–32 (showing that the employer spoke with the harasser and that the harasser was given a warning; the harassment stopped after action by the employer was taken). No liability could be found because under *Meritor Savings Bank v. Vinson*, 477 U.S. at 67, the Supreme Court stated that to be hostile the work environment must be severe and pervasive.

environment when taking the job.<sup>57</sup> Further, the Tenth Circuit states that a blue-collar working environment has a different social context than a white-collar environment. Thus, the blue-collar working environment should be taken into account when deciding what is hostile according to the norms of that particular working environment.<sup>58</sup> The Eighth Circuit has followed the Tenth Circuit's lead. Thus, when a plaintiff works in a sexually hostile environment, a claim under Title VII is harder to prove.<sup>59</sup> However, the Tenth and Fifth Circuits differ in how they use work environment in their sexual harassment analyses. In contrast to the Tenth and Eighth Circuits, the Fifth Circuit only looks at work environment to distinguish between teasing-type behavior and actual harassment and does not consider characteristics of the work environment to show that the environment was sexually charged.

1. *Tenth and Eighth Circuits—Title VII Meant Only for Harassment that Makes the Current Rough Work Environment Even Worse*

In 1989, the Tenth Circuit declared its stance concerning work atmosphere in *Ebert v. Lamar Truck Plaza*.<sup>60</sup> The plaintiffs were employed by a truck plaza restaurant.<sup>61</sup> The Tenth Circuit noted that the atmosphere was filled with rough language, but found that Title VII was not intended to change the social mores of American workplaces.<sup>62</sup> Thus, the plaintiff lost her claim because the harassment

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<sup>57</sup> See, e.g., *Ebert v. Lamar Truck Plaza*, 878 F.2d 338 (10th Cir. 1989); *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531 (10th Cir. 1995); *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408 (10th Cir. 1997).

<sup>58</sup> In this way, the Tenth Circuit will ask with every claim: Is this more hostile than everyday working conditions in this environment?

<sup>59</sup> This is in stark contradiction to the Sixth Circuit's interpretation of a hostile work environment sexual harassment claim.

<sup>60</sup> 878 F.2d 338 (10th Cir. 1989).

<sup>61</sup> *Id.* One current and five former employees brought suit. *Id.*

<sup>62</sup> *Id.* at 339 (discussing *Rabidue v. Osceola Ref. Co.*, 584 F.Supp. 419, 430 (E.D. Mich. 1984)). "In *Rabidue* it was held that Title VII was not intended to cover language in the workplace that was 'rough hewn and vulgar,' nor was Title VII designed 'to bring about a magical transformation in the social mores of American workers.'" *Id.*

It should be noted that the *Rabidue* court's holding regarding the issue of psychological injury has been overruled. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

*Rabidue* is a Sixth Circuit case decided before *Williams*. After *Williams*, however, *Rabidue* has only been cited once in an unpublished decision with regard to the fact that Title VII was not to bring about a change in the social mores of the American workplace. However, the case was distinguished from *Rabidue* because the comments that the plaintiff claimed were sexually harassing were made to the plaintiff specifically. See *Felger v. Tubetech, Inc.*, No. 99-3020, 2000 WL 263276, at \*3 (6th Cir. Mar. 1, 2000). However, in the end, *Williams* makes clear that "the standard for sexual harassment does not vary depending on the work environment." *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 555 (6th Cir. 1999). Overall,

she complained of was "commonplace" and Title VII was not designed to alter "commonplace" behavior in certain working environments.

In 1993, the Tenth Circuit in *Sauers v. Salt Lake County*<sup>63</sup> again asserted that the atmosphere of a working environment is an important factor in a Title VII hostile work environment claim. In this case, a jury found for the plaintiff with regard to sexual harassment. However, the district court did not consider the conduct sexually harassing and overturned the jury's verdict.<sup>64</sup> The Tenth Circuit upheld the district court's decision.<sup>65</sup>

The Tenth Circuit found that this was an unusually rough and sexually charged atmosphere. Further, the court stated that this raw atmosphere was known and tolerated by all employees, including the plaintiff. However, the plaintiff alleged that the atmosphere worsened when the county attorney decided not to run for re-election.<sup>66</sup> Thus, the court essentially stated that because the plaintiff did not complain about and even participated in the sexually charged atmosphere, the plaintiff was barred from claiming relief under Title VII because the behavior was not unwelcome.<sup>67</sup> The argument is flawed, however, because the conduct the plaintiff complained of was not ordinary sexual banter, but specific harassment directed toward the plaintiff that was not experienced by the plaintiff for the first two years of her employment. The court stated that the plaintiff accepted the specific harassment because she knew of the general rough work environment and tolerated it. This means that if the plaintiff worked in a pristine office environment, the same sexually harassing conduct most likely would have been actionable under Title VII. In this way, a plaintiff working in a rough atmosphere, such as a blue-collar atmosphere, does not receive the same protection under the law.

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*Rabidue* has not been construed against *Williams*' assertion in this regard by the Sixth Circuit. This is unlike the Tenth Circuit, which has quoted *Rabidue* in order to find a sexual harassment claim prohibited because of a particularly rough working environment. See *Gross*, 53 F.3d at 1538.

<sup>63</sup> 1 F.3d 1122 (10th Cir. 1993).

<sup>64</sup> *Sauers v. Salt Lake County*, 722 F. Supp. 676 (D. Utah 1989).

<sup>65</sup> *Sauers*, 1 F.3d at 1126-27. The plaintiff admitted the rough atmosphere and admitted being called "bruiser," making the men in the office avoid the plaintiff. Also, a number of witnesses stated that the plaintiff had engaged in the raw atmosphere by participating in off-color joking and sexual conversations. *Id.*

<sup>66</sup> *Id.* at 1126. The attorney made comments about the plaintiff's breasts and attire and asked the plaintiff to "swap spit." Further, the attorney outlined a pattern of plaintiff's sweater in the air in front of her breasts. The attorney attempted to grab her breasts and rubbed his groin against her shoulder. *Id.* at 1126-27.

<sup>67</sup> See *id.* (stating that the co-worker's conduct "was not viewed by plaintiff as unwelcome sexual harassment").

In 1995, the Tenth Circuit again asserted its stance on work environment and sexual harassment in *Gross v. Burggraf Construction Co.*<sup>68</sup> The plaintiff, employed as a water-truck driver, asserted that her supervisor treated her in a vulgar manner because she was a woman.<sup>69</sup> Before deciding if the environment was sufficiently hostile under Title VII, the court examined the atmosphere of plaintiff's work environment. The court noted that in the world of road construction, profanity and vulgarity are not considered hostile. Further, the court noted that the plaintiff had been vulgar with crew members as well.<sup>70</sup> The Tenth Circuit for the first time stated bluntly: "The standard for determining sex harassment would be different depending upon the work environment."<sup>71</sup> The court then explained that Title VII was not meant to change social norms.<sup>72</sup> Thus, again, employees in rough atmospheres, mostly blue-collar work environments, are treated differently under Title VII. According to *Gross*, even if the plaintiff was treated rudely because of her gender, the work environment was rough and the plaintiff should have expected such treatment. Therefore, the conduct of the plaintiff's supervisor, even if actionable in other environments, is not actionable in this sexually charged and raw environment under Title VII.<sup>73</sup>

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<sup>68</sup> 53 F.3d 1531 (10th Cir. 1995).

<sup>69</sup> *Id.* at 1531, 1536. The supervisor would harass the plaintiff in front of other employees, would call her "dumb" and "cunt," and used other profanity in reference to her. One time over a CB radio, the supervisor asked one of plaintiff's co-workers: "Mark, sometimes don't you just want to smash a woman in the face?" *Id.*

<sup>70</sup> *Id.* at 1537-38. The plaintiff admitted to using profane language and telling off-color jokes on occasion.

<sup>71</sup> *Id.* at 1538 (citing *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (E.D. Mich. 1984)). Further, the Court explained that Title VII was not meant to stop sexual jokes, conversations, or the passing around of "girlie" magazines. *See id.*

<sup>72</sup> *See id.* On a side note, some courts find a rough work environment not offensive or hostile because both men and women are equally subjected to the roughness. Therefore, these courts would feel that a woman can be called a "cunt" just as long as men are also called "pricks," and further, posters of nude men and women would not be hostile because it would be offensive to both genders. *See B. Glenn George, The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 30-31 (1993). This ignores the fact that men and women may react to these stimuli differently. *See id.*

<sup>73</sup> The Tenth Circuit continues to decide Title VII cases by taking into account the particular work environment of the plaintiffs. In 1997, the Tenth Circuit, in *Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408 (10th Cir. 1997), again refused to treat all women equally regardless of work environment. The district court altered the judgment of the jury, which was in favor of the plaintiff, by reducing the compensatory damages award from \$270,000 to \$200,000 and also set aside the \$89,000 in damages for loss of future fringe benefits. *Smith v. Northwest Fin. Acceptance, Inc.*, 964 F. Supp. 327, 327 (D. Wyo. 1996). Even though the Tenth Circuit upheld the change in damages, the jury's verdict was upheld. The plaintiff in *Smith* worked as an accounts service representative. The Tenth Circuit found that the conduct of the plaintiff's supervisor was harassing because the office atmosphere was



The central flaw in the Tenth Circuit's reasoning is its assumption that women choose their work environments. Often, women can only find work in less refined atmospheres and therefore are forced into lewd work environments.<sup>74</sup>

not rough and tumble. *Smith*, 129 F.3d at 1414 (showing that the court contrasted this situation with that of *Gross v. Burggraf Construction Co.*, which was filled with roughness and sexual innuendo). Further, no sexual comments were made to the plaintiff's co-workers, contributing to the conclusion that the atmosphere was not a blue-collar manufacturing work environment. Therefore, even though the plaintiff's claim was upheld, it supports the fact that work environment is taken into account.

In this way, the plaintiff in *Smith* was allowed better treatment under the law than the plaintiffs in *Gross*, *Sauers*, and *Ebert*. This shows that victims of sexual harassment in a rougher atmosphere get less protection in the Tenth Circuit than those victims who are fortunate enough to find careers in a more refined setting. Overall, the Tenth Circuit looks at the atmosphere of a work environment to decide if a plaintiff has a claim under Title VII, all because the plaintiff allegedly "chose" to put up with the atmosphere in order to make a living and thus the plaintiff "chose" to be harassed.

In *Pascouau v. Martin Marietta Corp.*, No. 98-1099, 1999 U.S. App. LEXIS 15712 (10th Cir. July 14, 1999), the plaintiff experienced harassment by her co-workers and supervisors while working in document control. The plaintiff heard many discussions involving sex, sexual materials were brought into the plaintiff's office, and the plaintiff was belittled by her co-workers and called nicknames referring to her breast size. *Id.* at 874. The court cited *Oncale* as support for the position it had taken in the past on work environment. *Id.* at 878 (citing *Oncale*, 523 U.S. at 82) (showing that the court must look at "the social context in which particular behavior occurs and is experienced by the target"). The court noted that the environment in which the plaintiff worked was rough and filled with lewd behavior. However, the court took one step further than before and expressly stated that lower courts could use the educational level of employees to excuse rough and lewd behavior under Title VII. Overall, even though the court admits that the plaintiff was exposed to "inappropriate comments and conduct," the environment was not hostile given the rough working conditions and the educational level of the people who worked with the plaintiff. *See id.* at 880.

<sup>74</sup> See Ruth Needleman & Anne Nelson, *Policy Implications: The Worth of Women's Work*, in *THE WORTH OF WOMEN'S WORK: A QUALITATIVE SYNTHESIS* 293, 293 (Ann Statham et al. eds., 1987) (explaining that skilled women are "forced to accept the most tedious jobs"); BEVERLY SKEGGS, *FORMATIONS OF CLASS & GENDER* 162 (1997) (stating that there is an exclusion of women in the labor market). *See also* Francine D. Blau & Marianne A. Ferber, *Occupations and Earnings of Women Workers*, in *WORKING WOMEN: PAST, PRESENT, FUTURE* 37, 57 (Karen Shalleross Koziara et al. eds., 1987) (showing that sex accounts for "a substantial portion of the wage gap"); LINDA MCDOWELL & ROSEMARY PRINGLE, *DEFINING WOMEN: SOCIAL INSTITUTIONS AND GENDER DIVISIONS* 154-55 (1995) (showing that a majority of women are in jobs which consist of low pay and a bad working environment); CHRISTINE STANSELL, *CITY OF WOMEN* 105-06 (1986) (tracing sex segregation in the workforce back as early as 1860); Ronnie Steinberg, *Gendered Instructions: Cultural Lag and Gender Bias in the Hay System of Job Evaluation*, in *GENDER INEQUALITY AT WORK* 57, 57 (Jerry A. Jacobs ed., 1995) ("Gender influences job content, the structure of authority and control, access to jobs, training opportunities, and mobility channels.").

It should be noted that sexual harassment is most frequent "in occupations and work places where women are new and are in the minority." Daniel Goleman, *Sexual Harassment: About*

The Tenth Circuit, then, is punishing these women for an environment that is not even their fault or of their "choosing" giving them less protection under Title VII.<sup>75</sup>

In *Scusa v. Nestle U.S.A. Co.*,<sup>76</sup> the Eighth Circuit joined the rank of circuit courts that have looked at work environment in deciding the merits of a Title VII claim. The plaintiff in *Scusa* worked in a manufacturing plant in the packaging department. She was sexually harassed as well as ostracized from the department.<sup>77</sup> Because the plaintiff participated in rude behavior in the plant, the district court found that the plaintiff was not sexually harassed.<sup>78</sup> The *Scusa* court viewed *Oncale* in its opinion as showing that the court should not enforce a "general civility code" and that ordinary socializing in the workplace should be distinguished from sexual harassment.<sup>79</sup> The Eighth Circuit then went on to reason that even though the plaintiff was subjected to rude conduct, the conditions of her employment were not altered enough to make her work environment hostile.<sup>80</sup> Since the court looks to the plaintiff's work environment, what constitutes harassment depends on the environment of the employment. In this way, a plaintiff in a rough environment must have a stronger case of harassing

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*Power, Not Lust*, N.Y. TIMES, Oct. 22, 1991, at C1. Thus, "women who hold jobs traditionally held by men are far more likely to be harassed than women who do 'women's work.'" *Id.* at C12. This is especially noted "[i]n the blue-collar work place, [where] there's often a real hostility toward women." *Id.*

<sup>75</sup> See Linda K. Christian-Smith, *Voices of Resistance: Young Women Readers of Romance Fiction*, in BEYOND SILENCED VOICES: CLASS, RACE AND GENDER IN UNITED STATES SCHOOLS 169, 170 (Lois Weis & Michelle Fine eds., 1993) (showing that women want to have "financial independence, political power, and more equitable relations").

<sup>76</sup> 181 F.3d 958 (8th Cir. 1999).

<sup>77</sup> *Id.* at 961. After a co-worker complained about sexual harassment, the plaintiff was harassed. Plaintiff believes she was harassed because her co-workers thought she had filed the complaint. The plaintiff was ostracized by co-workers and supervisors, including being made fun of and getting thumped on the head. Further, the plaintiff was patted on her buttocks, kisses were blown to her, and sexual comments were made to her. A supervisor yelled at her and even made threatening gestures toward the plaintiff. After the plaintiff filed a complaint, the behavior worsened: the plaintiff's car was keyed and she was treated rudely by glares and doors slammed in her face. *Id.*

<sup>78</sup> See *id.* at 964 ("[F]inding appellant used offensive language, teased co-workers and made sexual and off-color comments, which undermined her claim that she found similar conduct by co-workers unwelcome and offensive.").

<sup>79</sup> See *id.* at 966.

<sup>80</sup> See *id.* at 967. The court noted that the plaintiff experienced "unpleasant conduct and rude comments," but because the environment (which was evasive and rude) was not changed dramatically for the plaintiff, the environment was not hostile enough to be actionable under Title VII. See *id.* This means that this same plaintiff who received this same conduct may have an actionable claim under Title VII if she worked in a good environment because her environment would have been changed.

instances than plaintiffs who are fortunate enough to work in a pristine environment. This means that women who cannot find work in a pristine environment lose protection under Title VII.

The Eighth Circuit tolerates sexual harassment in some atmospheres believing that in order to make a bad environment worse, more sexual harassment must exist in order for a claim to be brought. However, this belief is not on par with racial harassment, which is also protected under the same statutory language of Title VII as sexual harassment.<sup>81</sup> Racial harassment plaintiffs do not have to show that a rough environment was made worse because of racial harassment.<sup>82</sup> Without explanation for the distinction, courts are much more willing to enforce a “civility code” when dealing with racial harassment claims rather than sexual harassment claims.

## *2. Fifth Circuit—Looking to Work Environment Only to See if Behavior is Harassing and Not Teasing and Does Not Take the Particular Type of Work Environment into Account*

Since *Oncale*, the Supreme Court same-sex sexual harassment case, the Fifth Circuit has changed its position on whether work environment is to be taken into account in Title VII hostile work environment claims. In *Indest v. Freeman Decorating, Inc.*,<sup>83</sup> the plaintiff worked as an exhibitor services representative. Her supervisor made sexual advances towards her, even though the plaintiff warned her supervisor that his conduct was harassment.<sup>84</sup> The Fifth Circuit cited *Oncale* for the proposition that a court must look to social context, but only to distinguish between roughhousing and harassment. “Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing and roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would

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<sup>81</sup> See Robert J. Gregory, *You Can Call Me A “Bitch” Just Don’t Use the “N-Word”*: Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co., 46 DEPAUL L. REV. 741 (1997) (urging that sexual harassment claims, unlike other Title VII claims, present numerous hoops that a plaintiff must jump through).

<sup>82</sup> See Gregory, *supra* note 81 (explaining that courts do not allow sexual harassment claims to survive in rough environments and distinguishes this situation from racial harassment claims). “In the sex context, on the other hand, courts seem much more willing to acquiesce in the common mores of the workplace or society.” *Id.* at 748. See also George, *supra* note 74, at 30–32.

<sup>83</sup> 164 F.3d 258 (5th Cir. 1999).

<sup>84</sup> *Id.* at 260. The supervisor made crude sexual comments and gestures. When the plaintiff informed the supervisor that he was harassing her, the supervisor told her never to threaten a superior. *Id.*

find severely hostile or abusive.”<sup>85</sup> Therefore, unlike the Eighth Circuit in *Scusa*, the Fifth Circuit does not claim that *Oncale*’s language dictates taking the particular type of work environment into account.

Thus, the Fifth Circuit looks to work environment only to see if the harassment was actually harassing and not teasing. The Fifth Circuit does not take the *Oncale* language to the extreme like the Tenth and Eighth Circuits. The Fifth Circuit did not discuss the atmosphere of the employment, but instead looked to the duration of the harassment and the incidents involved.<sup>86</sup> The court decided that even though the conduct was of short duration and was not of an extreme nature, the plaintiff may have been harassed. However, the plaintiff in this case could not win because the employer took affirmative action to correct the problem, and the plaintiff’s supervisor did not harass the plaintiff after the employer took action.<sup>87</sup>

Overall, the Fifth Circuit’s stance is less severe than the Eighth and Tenth Circuits’ positions. Therefore, even though the Fifth Circuit uses the *Oncale* opinion to justify looking to work environment, the Fifth Circuit considers whether the behavior was teasing or harassing and does not require a more hostile set of circumstances in a rough environment for a plaintiff to be successful in a Title VII suit. Whether the Fifth Circuit takes the *Oncale* opinion to the next level, as the Tenth and Eighth Circuits have done, remains to be seen.

## V. THE SPLIT AMONG THE COURTS REGARDING NON-SEX BEHAVIOR

There is also disagreement among the circuits as to whether non-sex behavior can be taken into account when a plaintiff presents a sexual harassment claim. *Williams* asserted that non-sex behavior can be harassing if the conduct is directed toward a plaintiff because of anti-female animus. Other courts, however, purport that only behavior that is sexual in nature can be considered sexually harassing. Some of these courts even require behavior that is “overtly sexual.”<sup>88</sup>

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<sup>85</sup> *Id.* at 263 (quoting *Oncale*, 523 U.S. at 82).

<sup>86</sup> *See id.* at 264. The court did not award damages to the plaintiff because the harassment involved was of a short duration. Further, the court found the vulgar remarks no more offensive than what the plaintiff hears from day to day (i.e. on television). *Id.*

<sup>87</sup> *Id.* at 264–67.

<sup>88</sup> *See George, supra* note 72, at 32–33. Some courts require conduct that is “sexual in nature,” while other courts require behavior that is “clearly sexual.” Other courts recognize that if offensive conduct that is not sexual is directed at women, it is discriminatory and thus cognizable under Title VII. “The additional requirement that harassment be ‘sexual in nature’ again illustrates the disfavored status of the [Title VII sexual harassment] claim.” *Id.* at 33. *See also, e.g., Downes v. FAA*, 775 F.2d 288, 290 (Fed. Cir. 1985).

### A. Courts That Take Non-Sex Behavior into Account

Some courts feel that conduct that is not sexual can support a claim of sexual harassment under a hostile work environment claim. Like the Sixth Circuit in *Williams*, the Third and Eighth Circuits have declared that non-sex behavior can be used in a Title VII claim.<sup>89</sup> Furthermore, the Seventh Circuit has not explicitly stated that non-sex behavior can be used, but has approved instances in dicta in which non-sex behavior was found to be sufficient evidence of harassment.<sup>90</sup>

#### 1. Third, Sixth, and Eighth Circuits—Non-Sex Behavior Is Harassing if Motivated by Discriminatory Animus

In 1990, the Third Circuit in *Andrews v. City of Philadelphia*<sup>91</sup> first asserted that non-sex behavior can be sexually harassing. The plaintiffs were members of the Accident Investigation Division of the Philadelphia Police Department. The harassment included sexual and non-sexual behavior.<sup>92</sup> A jury found in favor of the plaintiffs on their Title VII claims; however, the district court reversed the jury's decision.<sup>93</sup> The Third Circuit asserted that the district court construed too narrowly the type of conduct that can be used in a sexual harassment claim.<sup>94</sup> The court of appeals overturned the district court's language "[t]o the extent that the court ruled that overt sexual harassment is necessary to establish a sexually hostile environment."<sup>95</sup>

Therefore, the Third Circuit purports that all behavior can be considered harassing as long as gender is shown to be a substantial factor in the conduct. "Intimidation and hostility toward women because they are women can obviously result from conduct other than sexual advances."<sup>96</sup> The Third Circuit believes that Title VII allows an employee to work in an environment free from hostility,

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<sup>89</sup> See *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); see, e.g., *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986).

<sup>90</sup> See *infra* notes 105–09 and accompanying text.

<sup>91</sup> 895 F.2d 1469 (3rd Cir. 1990).

<sup>92</sup> *Id.* at 1471. The harassment included abusive language in person and on the phone, physical injury to one of the plaintiffs, and destruction of property and work product. Further, pornographic pictures of women were displayed in the police station. *Id.* at 1471–72.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1485. The district court emphasized the lack of sexual advances or other sexual conduct. See *id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988)).

which means free from all hostile behavior, sexual or not.<sup>97</sup> In this way, the court of appeals looked at all evidence presented by the plaintiffs. The non-sexual conduct included the recurrent disappearance of the plaintiffs' case files and work product and the destruction of the plaintiffs' property.<sup>98</sup> Thus, the Third Circuit allows non-sex behavior to be taken into account under Title VII. This gives a plaintiff an opportunity to either make a stronger case by using non-sex harassment to support the claim or bring a case if the only harassment experienced is non-sexual in nature.

With its 1988 decision in *Hall v. Gus Construction Co., Inc.*,<sup>99</sup> the Eighth Circuit allowed courts to look at non-sex behavior in Title VII claims. The plaintiffs worked as traffic controllers at construction sites and were subjected to verbal sexual abuse<sup>100</sup> and offensive touching.<sup>101</sup> However, the plaintiffs were also subjected to non-sexual harassment.<sup>102</sup> The Eighth Circuit held that any harassment that occurs because of an employee's gender is actionable under Title VII, sexual or not, as long as the harassment is unwelcome.<sup>103</sup>

The Eighth Circuit justifies the inclusion of non-social behavior in Title VII claims by emphasizing the broad remedial purpose of Title VII and treating sexual harassment claims on par with racial harassment claims.<sup>104</sup> Therefore, the Eighth Circuit joins the Third and Sixth Circuits by not requiring sexual conduct in order for a plaintiff to bring an action under Title VII for a hostile work

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<sup>97</sup> See *id.* (construing *Vinson*, 477 U.S. at 65). The Supreme Court gives employees the right to work in "an environment free from discriminatory intimidation, ridicule and insult." *Andrews* points out that the Supreme Court has in no way limited this concept to intimidation or ridicule that is sexual. *Id.*

<sup>98</sup> *Id.* at 1486.

<sup>99</sup> 842 F.2d 1010, 1014 (8th Cir. 1988).

<sup>100</sup> *Id.* at 1012. The women were called "fucking flag girls," "Herpes," "Cavern Cunt," and "Blond Bitch." One co-worker repeatedly asked one of the women if she "wanted to fuck" and requested both women to have oral sex with him. *Id.*

<sup>101</sup> *Id.* The co-workers grabbed the plaintiffs' thighs and tried to grab the plaintiffs' breasts. *Id.*

<sup>102</sup> See *id.* One co-worker urinated in a plaintiff's water bottle. Co-workers also urinated in the plaintiffs' gas tank. The women were refused a truck to take into town for a bathroom break, and the women's complaints about malfunctioning of equipment were ignored while co-workers' complaints were heard. *Id.*

<sup>103</sup> See *id.* at 1014.

<sup>104</sup> See *id.* Despite the fact that the EEOC regulation emphasizes sexual behavior, the court of appeals found that Title VII describes discrimination in broad terms and that Congress did not choose to enumerate specific types of acts as discrimination. Further, the Eighth Circuit found that Firefighter Supper Clubs could not exclude black employees. The Eighth Circuit in dicta could not rationalize a different result if the Supper Clubs were excluding female employees, suggesting that sexual harassment and racial harassment should be treated the same. *Id.* (construing *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506 (8th Cir. 1972)).

environment claim. This means that women can more easily bring suits in these circuits if they are subjected to anti-female animus that is not sexual in nature.

## 2. Seventh Circuit—*Dicta* Pointing towards Allowing Non-Sex Behavior in Title VII Claims

In 1986, the Seventh Circuit, in *Bohen v. City of East Chicago, Indiana*, stated in dicta that a plaintiff could use non-sex behavior to prove a Title VII claim.<sup>105</sup> The plaintiff worked as a dispatcher in the East Chicago Fire Department. A senior dispatcher, who later became the plaintiff's immediate supervisor, was the source of much of the harassment. The harassment against the plaintiff was sexual in nature.<sup>106</sup> Even though the plaintiff's case was brought under Title VII, the plaintiff won under the Equal Protection Clause of the Fourteenth Amendment. In its decision, the court asserted that the Equal Protection Clause reasoning is analogous to the reasoning of a sexual harassment claim under Title VII.<sup>107</sup>

The Seventh Circuit in dicta approved of various fact situations, though not similar to the sexual harassment in question, that could be used to support a sexual harassment claim. These fact situations involved non-sexual behavior.<sup>108</sup> However, it is important to note that the Seventh Circuit did not cite to a case in which the only source of harassment was non-sexual,<sup>109</sup> thus whether the Seventh Circuit would allow a Title VII case without any "sexual" harassment is still not known. Overall, one can infer from the dicta in *Bohen* that the Seventh Circuit would, at least, allow a plaintiff to support her claim with non-sex behavior.

### B. Courts that Do Not Take Non-Sex Behavior into Account

The leading proponent of the claim that non-sexual behavior is not harassment under Title VII is the Tenth Circuit. At first, the Tenth Circuit did not

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<sup>105</sup> 799 F.2d 1180 (7th Cir. 1986).

<sup>106</sup> *Id.* at 1181–83. The plaintiff's supervisor grabbed the plaintiff's crotch, would rub his pelvis against her, forced her to leave the door open when she went to the bathroom, and made numerous obscene comments about sexual conduct. Further, because the plaintiff refused the supervisor's advances, rumors were started that the plaintiff was a lesbian. *Id.*

<sup>107</sup> *Id.* at 1185–86. Because the harassment under Title VII did not result in termination of employment, the district court did not abuse its discretion in denying the plaintiff the right to amend her complaint. So, the alternative for the court of appeals was to find for the plaintiff under the Equal Protection Clause. *See id.* at 1188.

<sup>108</sup> *See id.* at 1186 (construing *Woerner v. Brzeczek*, 519 F. Supp. 517 (N.D. Ill. 1981) (showing that liability can be found in the case of belittling remarks to a plaintiff in front of other employees and interception of mail and phone messages).

<sup>109</sup> *See id.*

reject non-sex behavior in Title VII harassment actions.<sup>110</sup> However, later cases not only require sexual behavior, but use strong language such as requiring "overtly sexual" behavior.<sup>111</sup> In this way, even if an aggressor's conduct is due to a victim's gender, women in the Tenth Circuit cannot bring a claim if the conduct is not sexual. Further, if a plaintiff does have sexual conduct to back up a harassment claim, the plaintiff cannot strengthen her claim with evidence of conduct that is not sexual in nature but does evince an anti-female animus.<sup>112</sup> Also, the Fifth and Eleventh Circuits, in dicta, have reasoned that non-sex behavior should not be taken into account in a Title VII claim although the courts have not explicitly held as such.<sup>113</sup>

1. *Tenth Circuit—Only "Overtly" Sexual Behavior Can Be Used in a Title VII Sexual Harassment Claim*

In 1995, the Tenth Circuit in *Howard v. Beech Aircraft Corporation* disallowed the use of non-sex behavior in a Title VII claim.<sup>114</sup> The plaintiff was a sheet metal parts inspector for the defendant.<sup>115</sup> The plaintiff complained of several comments made to her, including that she had "Martha Lattamore syndrome" and that the "smartest woman at Beech was not as smart as the dumbest man."<sup>116</sup> Also, one of the employees pretended to wipe his hands on the plaintiffs' shirt.<sup>117</sup> However, the Tenth Circuit felt that the conduct was not "overtly sexual enough" to support a sexual harassment claim under Title VII.<sup>118</sup> Thus, the conduct cannot just relate to sexuality (such as comments regarding breast size), but the conduct must be overtly sexual in nature in order for a plaintiff to succeed under Title VII in the Tenth Circuit.

A month later, the Tenth Circuit put more bite into its position that non-sex behavior could not be used in a sexual harassment claim in *Gross v. Burggraf*

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<sup>110</sup> See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987).

<sup>111</sup> See *infra* notes 123–29 and accompanying text.

<sup>112</sup> See *id.*

<sup>113</sup> See, e.g., *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *B.T. Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986).

<sup>114</sup> No. 94-3259, 1995 U.S. App. LEXIS 14692 (10th Cir. July 14, 1995).

<sup>115</sup> *Id.* at \*2. At one point, the plaintiff was suspended with pay. Upon returning to work, the plaintiff filed a complaint alleging age, sex, and ancestry discrimination. *Id.*

<sup>116</sup> *Id.* at \*6–7. (The plaintiff felt that the "Martha Lattamore syndrome" comment was made because she had big breasts, and the comment insinuated that the plaintiff's back must hurt. *Id.* at \*6–7).

<sup>117</sup> *Id.* at \*7.

<sup>118</sup> *Id.* at \*7. The court also felt that the comments made by plaintiff's co-workers were not frequent enough. *Id.*



*Construction Company*.<sup>119</sup> The Tenth Circuit held that a statement relating to wanting to punch women in the face was not sexual enough, and thus did not involve sexual harassment. "Gross had to present admissible evidence that she was subjected to a 'steady barrage of opprobrious [sexual] comments'"<sup>120</sup> in order to bring a sexual harassment claim. Further, the Court felt that using the word "ass" was not sexual harassment because it is a sexual term that refers to the anatomy of both sexes.<sup>121</sup> Also, heated comments to the plaintiff, even if only directed to the plaintiff, were not sexually harassing because none of the comments were sexual.<sup>122</sup> Therefore, the Tenth Circuit in *Gross* strengthened its previous new position given in *Howard*.

In *Turner v. Reynold Ford, Inc.*, the Tenth Circuit took its assertion one step further and denied a claim because the behavior asserted by the plaintiff was not sexual enough.<sup>123</sup> The plaintiff worked as a salesperson at a car dealership. The plaintiff and a co-worker had a brief sexual relationship; after the relationship ended the co-worker began to harass the plaintiff.<sup>124</sup> There were some incidents of harassment that occurred at work.<sup>125</sup> The court discounted the sexual conduct toward the plaintiff while she was not at work. While at work, however, the harassment was not sexual in nature and was thus not sexual harassment at all.<sup>126</sup> Since the plaintiff was subjected to no "overtly sexually related conduct at work," the Tenth Circuit clearly stated that the plaintiff was not sexually harassed at all and did not have a claim under Title VII.<sup>127</sup> Therefore, the Tenth Circuit went against the spirit of *Oncale* by asserting that at work behavior that is not sexual cannot be used to support a Title VII claim, even if after work, sexual behavior

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<sup>119</sup> 53 F.3d 1531 (10th Cir. 1995). See also *supra* notes 68–73 and accompanying text for the facts and details of this case.

<sup>120</sup> *Id.* at 1543 (construing *Bolden*, 43 F.3d 545, 551 (1995)).

<sup>121</sup> *Id.* Therefore, the Tenth Circuit requires more than merely relating to sexuality; it must be a sexually charged term that can relate only to women, even if the term was used only against a woman. *See id.*

<sup>122</sup> *Id.* at 1546. The Court refers to statements such as her supervisor saying the following: "her problem"; "skating on thin ice"; and needing to call him "sir." *Id.*

<sup>123</sup> No. 97-6152, 1998 U.S. App. LEXIS 9552 (10th Cir. May 5, 1998).

<sup>124</sup> *Id.* at \*2. Once the plaintiff ended the relationship with the co-worker, the co-worker became dominant and controlling. At one point, the co-worker followed the plaintiff and assaulted and raped her. At another point, the co-worker grabbed the plaintiff's arm giving her a bruise. Both of these incidents happened away from work. *Id.* at \*3.

<sup>125</sup> *Id.* at \*3. The co-worker threatened to ruin the plaintiff's name. Furthermore, the co-worker was talking about the plaintiff with other co-workers. The co-worker followed the plaintiff around the office trying to talk to the plaintiff. *Id.*

<sup>126</sup> *See id.* at \*13–14. "The most that can be said for plaintiff's workplace environment is that [the co-worker] at times followed her around, tried to talk to her and exchanged harsh words with her." *Id.* at \*14.

<sup>127</sup> *See id.* at \*14.

was used to harass the plaintiff. Thus, not only does a plaintiff in the Tenth Circuit need overtly sexual behavior to bring a claim, this overtly sexual behavior must be shown by the plaintiff to have occurred at work.<sup>128</sup> Any sexual harassment after work hours, sexual or not, is not sufficient in the Tenth Circuit to bring a Title VII claim.<sup>129</sup>

The Tenth Circuit will allow a claim for sexual harassment only if the conduct is clearly sexual in nature, if the sexual comment only applies to women, *and* if the conduct happened only at work. In this way, a woman has little help from Title VII, because in the Tenth Circuit, Title VII protects women only from a small sliver of harassment.

A central misunderstanding of the Tenth Circuit concerns the nature of sexual harassment. Sexual harassment is not about sex, but about power.<sup>130</sup> If the Tenth Circuit allows only sexual behavior to be considered, the problem Title VII was created to combat, namely the effect of harassment on women, will not be

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<sup>128</sup> At least two cases have allowed evidence of harassment outside of the workplace to bolster a sexual harassment claim when the harassment outside of the workplace can be tied to the employer. *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, n.9 (3rd Cir. 1999) (showing that when the plaintiff is forced to work with the harasser outside of the workplace and the harassment occurred while working with the co-worker on job related activities outside of the workplace, the harassment has connection to the employer); *Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 770-74 (6th Cir. 1996) (showing that the harassment was tied to work even though the alleged harassment took place outside of work; however, the plaintiff did not prevail on her Title VII claim because the plaintiff did not give the employer timely notice and the harassment was not outrageous enough).

<sup>129</sup> Sexual conduct has been discussed recently in a successful sexual harassment claim in the Tenth Circuit. In *Shoemaker v. National Management Resources Corp.*, decided in April of 1998, the Tenth Circuit continued stating that non-sex behavior could not be used in a Title VII claim. No. 97-6251, 1998 U.S. App. LEXIS 7147 (10th Cir. Apr. 9, 1998). Most of the harassment the plaintiff endured was sexual in nature, even though there was at least one incident where the harassment was non-sexual. *Id.* at \*3-4 (showing that the supervisor slammed a book in the plaintiff's face). The court noted that most of the behavior was sexual and thus the defendant was not entitled to summary judgment, remanding the case back to the district court. *Id.* at \*9 ("[E]xcept for the book-slamming incident, the incidents alleged by plaintiff are either overtly sexual or could reasonably be construed as sexual.") Therefore, even though the Tenth Circuit did not deny a claim because it was not supported by non-sexual behavior, the court allowed the plaintiff's claim to survive summary judgment only because most of the conduct was sexual in nature. This allows one to conclude that the Tenth Circuit was still only willing to listen to Title VII claims involving sexual behavior.

<sup>130</sup> *See Gargi Bhattacharyya, Offence is the Best Defence?: Pornography and Racial Violence*, in *RETHINKING SEXUAL HARASSMENT* 82, 82 (Clair Brant & Yun Lee Too, eds., 1994) (explaining that sexual harassment is a reminder of "power relations"); Daniel Goleman, *supra* note 74, at C1 (explaining that extensive research has shown that sexual harassment has more to do with power than sex). *See also* DAVID M. BUSS & NEIL M. MALAMUTH, *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES* 54 (1996) (urging that sexual harassment is a combination of asserting power, sexual behavior, and conflict).

treated.<sup>131</sup> Therefore, there will be no recourse for women who are harassed in the workplace because of their sex, as supervisors and co-workers will change their tactics from sexual to non-sex sexual harassment.<sup>132</sup> In this way, Title VII is ineffective in combating sexual harassment, which is a power issue and not a sex issue.

Furthermore, the Tenth Circuit is allowing claims of harassment under Title VII to be treated differently by allowing only sexual behavior to count as sexual harassment. Racial harassment plaintiffs do not have to show that the aggressor's conduct was "racial in nature."<sup>133</sup> Since racial harassment plaintiffs must only show that the harassment exhibited racial animus, sexual harassment plaintiffs should only have to show anti-female animus when bringing a claim, so that each of these Title VII claims will be treated on a par with one another.

## 2. The Eleventh and Fifth Circuits—Using Dicta to Assert that Non-Sexual Conduct Cannot Be Used to Support a Sexual Harassment Claim

In 1982, the Eleventh Circuit stated in dicta that sexual harassment involved conduct only of a sexual nature in *Henson v. City of Dundee*,<sup>134</sup> while the Fifth Circuit followed suit in 1986 with *B.T. Jones v. Flagship International*.<sup>135</sup> Both cases involved harassment that was based on sexual behavior.<sup>136</sup> In *Henson*, the Eleventh Circuit cited to EEOC (Equal Employment Opportunity Commission) regulations in which sexual harassment was described as involving only sexual

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<sup>131</sup> See M. Isabel Medina, *A Matter of Fact: Hostile Work Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 312 (Spring 1999) (showing that Title VII is designed to "strengthen and improve Federal Civil rights laws, deter unlawful discrimination in the workplace, and to provide additional protections against unlawful discrimination in employment" (quoting Civil Rights Act of 1991 § 2, Pub. L. No. 102-66, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 et seq. (1994))).

<sup>132</sup> See Bhattacharyya, *supra* note 130, at 82 (showing that sexual harassment is about keeping power relations as they are and maintaining the status quo).

<sup>133</sup> See George, *supra* note 72, at 32–33. Racial harassment would be proven even if a supervisor used a negative non-racial word to describe all black employees, such as the word "dunce." *Id.* Furthermore, one case found the word "bitch" not sexually explicit, while another case in the same circuit found the word "nigger" racially explicit. See Gregory, *supra* note 81, at 750–56.

<sup>134</sup> 682 F.2d 897 (11th Cir. 1982).

<sup>135</sup> 793 F.2d 714 (5th Cir. 1986).

<sup>136</sup> In *Henson*, the Chief of Police requested that the plaintiff have sexual relations with him and threatened the plaintiff's job if the plaintiff would not comply with his demands. Further, the Chief of Police made numerous sexual inquiries and vulgarities towards the plaintiff. *Henson*, 682 F.2d at 899. In *B.T. Jones*, plaintiff's supervisor made sexual advances towards her and decorated an office party with bare-breasted mermaids. *B.T. Jones*, 793 F.2d at 716–17.

conduct.<sup>137</sup> Thus by taking into account the limited information given in the Eleventh Circuit, it seems like the Eleventh Circuit approves of the regulation and plans to follow the regulation if the need arises in the future.

In *B.T. Jones*, the Fifth Circuit, while stating the five factors needed to prove a hostile work environment sexual harassment claim, asserted that unwelcome sexual harassment included only harassment that was sexual in nature.<sup>138</sup> In this way, one can assume that the Fifth Circuit will neither hear a case involving only non-sex sexual harassment, nor allow a claim to be supported by non-sex behavior.

Even though neither the Eleventh or Fifth Circuits have made a ruling regarding non-sex behavior and Title VII claims, at least one author of a law review article found that these circuits will not allow non-sex behavior to become a part of a Title VII claim.<sup>139</sup> Therefore, the Fifth and Eleventh Circuits to this point *seem* to have joined the ranks of circuits that require all behavior to be sexual in order for a sexual harassment hostile work environment claim to succeed.

## V. PROPOSALS ABOUT WORK ENVIRONMENT AND NON-SEX BEHAVIOR

The *Williams* court was correct when it decided that the type of work environment should not be taken into account in a Title VII claim and non-sex behavior should be used to support a sexual harassment claim if the conduct was based on sex.<sup>140</sup> There are several reasons why these holdings in *Williams* are correct.

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<sup>137</sup> See *Henson*, 682 F.2d at 903 (quoting 29 C.F.R. § 1604.11(a) (1981)):

In pertinent part the guidelines provide that '[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'

*Id.*

<sup>138</sup> See *B.T. Jones*, 793 F.2d at 719. "*The employee was subject to unwelcome sexual harassment, i.e., sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome in the sense that it is unsolicited or uninvited and is undesirable or offensive to the employee . . .*" *Id.* (italics in original).

<sup>139</sup> See George, *supra* note 72, at 32-33 & nn.161, 162. This law review article notes that some circuits, including the Eleventh and Fifth Circuits, have needed conduct that is "sexual in nature" for a Title VII claim to be heard. See *id.*

<sup>140</sup> See *Williams*, 187 F.3d at 553, 564.

## A. *Work Environment*

There are many reasons why the work environment should not be taken into consideration in a Title VII sexual harassment claim. First, Title VII was enacted to improve the social status of women, and by taking work environment into account, women are forced to continue in their current social status.<sup>141</sup> Second, sexual harassment claims under Title VII should not look to work environment because environment is not considered in racial harassment claims under Title VII.<sup>142</sup> Third, the objective test given by *Harris v. Forklift Systems*<sup>143</sup> provides a safeguard against enforcing a civility code, without the need to take into account the plaintiff's work environment.<sup>144</sup>

### 1. *Social Status of Women*

The fact that a plaintiff works in a rough work environment should not diminish that individual's claims under Title VII. If the courts make a plaintiff in a rough working environment present a stronger sexual harassment claim in order to recover, then women who need protection the most will not receive it.<sup>145</sup> This is because women in blue-collar settings usually are there not out of choice, but because lack of money, education, or because society puts them there.<sup>146</sup> In this

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<sup>141</sup> See *infra* notes 145–54 and accompanying text.

<sup>142</sup> See *infra* notes 155–57 and accompanying text.

<sup>143</sup> 510 U.S. 17 (1993).

<sup>144</sup> See *infra* notes 158–60 and accompanying text.

<sup>145</sup> See Goleman, *supra* note 74, at C12 (explaining that in the blue-collar workplace there is hostility towards women because men see women as invading the “masculine work environment” and showing that women machinists had the highest reported harassment out of all occupations in a recent study). Furthermore, the use of harassment increases dramatically in jobs traditionally held by men. This is because harassment is used as a tactic to control or frighten women. See *id.*

<sup>146</sup> Women face severe limitations in the job market. See Ray Marshall & Beth Paulin, *Employment and Earnings of Women: Historical Perspective*, in WORKING WOMEN: PAST, PRESENT, FUTURE 1, 30 (Karen Shallcross Koziara et al. eds., 1987) (“[O]ccupational and earnings differences reflect differentials in education . . .”); MARJORIE FORD MARUGGE-WOLFE, A COMPARATIVE STUDY OF LOW-INCOME WOMEN AND THEIR PERCEIVED BARRIERS TO SUCCESSFUL ENROLLMENT, PARTICIPATION, OR COMPLETION OF EDUCATION, TRAINING, OR EMPLOYMENT 34, 34–43 (1999) (showing that lack of education and training as well as discrimination on the basis of sex in employment are barriers for women trying to find jobs); Needleman & Nelson, *supra* note 74, at 297 (“Improved educational opportunities are essential if women are to move out of traditional job areas.”). See also Christian-Smith, *supra* note 75, at 170 (explaining that despite “the desires of many women for financial independence . . . most women still earn less than men”); SKEGGS, *supra* note 74, at 162 (“[W]omen . . . [are] excluded from positions in the labor market, the education system, from forms of cultural capital and from trading arenas.”).

way, women with more money, education, and power in society have better protection from sexual harassment because they are better able to pick jobs with a refined work atmosphere.<sup>147</sup> Title VII was not enacted with the intent of protecting some women more than others. Title VII was enacted to protect women against harassment in all social settings.<sup>148</sup> In this way, the courts allow unequal protection under the law, discriminating against women who are the poorest and neediest of all. This type of atmosphere should not be allowed to be factored into a determination, making poor women suffer because they allegedly chose to work<sup>149</sup> in such an environment or because their claim has to show worse behavior than already exhibited in the rough environment.

Also, the courts, by allowing the type of environment to be factored into a harassment claim, are discouraging women from working.<sup>150</sup> This discouragement not only goes against the feminist movement, but goes against the purpose of the welfare system.<sup>151</sup> Women on welfare are most likely the

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<sup>147</sup> The job situation for women is bleak, causing them to have a lack of power. *See* Blau & Ferber, *supra* note 74, at 57 (showing that the wage gap is best explained by the sex of the worker); Christina Jonung, *Patterns of Occupational Segregation by Sex in the Labor Market*, in *SEX DISCRIMINATION AND EQUAL OPPORTUNITY: THE LABOR MARKET AND EMPLOYMENT POLICY* 44, 44 (Günther Schmid & Renate Weitzel, eds., 1984) (stating that a majority of women make up jobs which are "low paid, heavily supervised, with poor working conditions and little chance of advancement"); McDowell & Pringle, *supra* note 74, at 154-55 (same); STANSELL, *supra* note 74, at 105-06 (tracing labor segregation by sex to the mid-1800s); Steinberg, *supra* note 74, at 57 (1997) (showing that the market has "assumptions about gender that saturate the structure of compensation" keeping women in lesser quality jobs); Donald Tomaskovic-Devey, *Sex Composition and Gendered Earnings Inequality: A Comparison of Job and Occupational Models*, in *GENDER INEQUALITY AT WORK* 23, 23 (Jerry A. Jacobs ed., 1995) ("Sex composition has come to represent the dominant . . . explanation of the male-female earnings gap in sociological literature.").

<sup>148</sup> Title VII allows "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). The type of employee—blue-collar versus otherwise—was not distinguished under Title VII.

<sup>149</sup> Of course, these women do not choose to work in a bad environment. Most rough environments are blue-collar and many women cannot get better jobs in more pristine office environments. These women lack the money, education, and skill for better work environments. *See generally* SKEGGS, *supra* note 74.

<sup>150</sup> Women do avoid jobs and job advancement because of sexual harassment. *See* BRAVO & CASSEDY, *supra* note 9, at 48 (stating that women avoid the harasser causing neglect to job duties and career opportunities and showing that women leave jobs because of harassment); Ruth Jamieson, *Risk, Responsibility and Sexual Harm*, in *RETHINKING SEXUAL HARASSMENT* 99, 100 (Clair Brant & Yun Lee Too, eds., 1994) (showing that women "routinely engage in avoidance strategies" in order to avoid sexual harassment).

<sup>151</sup> *See* RANDY ALBELDA & CHRIS TILLY, *GLASS CEILINGS AND BOTTOMLESS PITS: WOMEN'S WORK, WOMEN'S POVERTY* 107 (1997) ("[W]elfare 'reform' in the 1980s and early 1990s focused on job placement. . ."); MIMI ABRAMOVITZ, *UNDER ATTACK, FIGHTING BACK:*

women who will be disadvantaged if courts are allowed to take a particular work environment into account.<sup>152</sup> Because women on welfare lack the ability to receive better jobs, these women are forced to deal with rough blue-collar environments, including harassment that women in other settings do not have to face.<sup>153</sup> In this way, these women see a greater benefit in returning to the welfare system than dealing with such harassing behavior with little pay.<sup>154</sup> Overall, the idea that a plaintiff who works in a rough environment must endure more harassment than other plaintiffs in better working environments is making a distinction on social class and is allowing unequal protection under the law. Title VII is available to all who are harassed, regardless of social class.

## 2. Putting Sexual Harassment on Par with Racial Harassment

In placing sexual harassment claims on par with racial harassment claims under Title VII, the courts cannot take a particular type of work environment into account.<sup>155</sup> Courts seem to hint that in the rough world of employment, a certain amount of sexual harassment is inevitable. The court system, however, does not

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WOMEN AND WELFARE IN THE UNITED STATES 10 (1996) ("There is very strong support for job training and large-scale job programs, not only for current welfare recipients but for all able-bodied Americans willing to work."); MARUGGE-WOLFE, *supra* note 146, at 31 ("Current government programs are designed to assist the chronically unemployed in getting education/training and/or jobs.").

<sup>152</sup> See ABRAMOVITZ, *supra* note 151, at 11 ("Women . . . represent 50 percent of the population and the majority of welfare clients."); ALBELDA & TILLY, *supra* note 151, at 8 (showing that poverty is a women's issue because two-thirds of all poor are women and thus government policy toward the poor is a women's issue); CATHERINE PELISSIER KINGFISHER, WOMEN IN THE AMERICAN WELFARE TRAP 3 (1996) (stating that women comprise the majority of public relief).

<sup>153</sup> Women on welfare often cannot find adequate work. "As with many women on welfare, lack of educational credentials left the women restricted to minimum wage work, primarily in the service sector." See KINGFISHER, *supra* note 152, at 24. These low-paying jobs usually do not provide medical coverage or child care. *Id.*; ABRAMOVITZ, *supra* note 151, at 32 ("[M]any welfare mothers hold sporadic full-time jobs rather than steady part-time ones, and the majority are low-wage 'women's occupations.'").

<sup>154</sup> See ABRAMOVITZ, *supra* note 151, at 84-89 (explaining that reasons why women have such a strong relationship with the welfare system include "sexism, patriarchy, the gender division of labor, and social reproduction"); KINGFISHER, *supra* note 152, at 24-27 (showing that women do consciously decide to go back to welfare instead of work).

<sup>155</sup> Courts do not treat claims of sexual harassment and racial harassment on the same terms. See Gregory, *supra* note 81, at 741-43 (1997). There is greater ease in establishing a *prima facie* case for all types of harassment under Title VII, except, of course, sexual harassment, which presents many hoops through which a potential plaintiff must jump. "[S]exual harassment claims are disfavored and should only be accepted in the clearest of cases." See George, *supra* note 72, at 3.

feel that racial harassment can be tolerated in the same way.<sup>156</sup> Because courts may feel that sexual harassment is inevitable, especially in certain types of work environments, the courts may not allow a claim for some plaintiffs in rough working environments in order to avoid enforcing a "civility code." However, when courts look to racial harassment, they do not look to see if a particular environment is rough and thus state that some types of racial harassment must be borne by the plaintiffs in these environments.<sup>157</sup> On the contrary, courts are more willing to force a "civility code" when dealing with racial harassment. Since the particular type of work environment is not stressed in racial harassment claims, sexual harassment, also under Title VII, should be treated in the same way.

### *3. Safeguard Available that Does Not Require Looking to Work Environment*

There is a safeguard for not enforcing a civility code, even if a particular work environment is not taken into account. This safeguard is the test given in *Harris v. Forklift Systems*<sup>158</sup> where the Supreme Court established subjective and objective tests. Before a plaintiff can be successful under Title VII, it must be shown that she was subjectively harassed, meaning that the plaintiff perceived that she was harassed. Further, a plaintiff must show that she was objectively harassed, meaning that a reasonable person would see the conduct as harassing.<sup>159</sup> By looking at the reasonable person's point of view, the courts cannot impose their own ideal standards about how a workplace should operate. Instead, the court is forced to look at what a reasonable person could tolerate. In this way, the court cannot impose an ideal civility code, but instead is forced to look through the eyes of a reasonable person grounded in reality.<sup>160</sup> Therefore, even without looking to a plaintiff's work environment, courts will not be able to force a "civility code" on all workplaces in society. This is because the court must look to a reasonable person's standard of what is hostile, not a moral code of how workplaces should operate.

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<sup>156</sup> See Gregory, *supra* note 81, at 776.

<sup>157</sup> See generally George *supra* note 72, at 30-32 (showing one difference between racial and sexual harassment being that sexual harassment looks to work environment to see if everyone in an environment deals with a particular type of behavior). "In the sex context, on the other hand, courts seem much more willing to acquiesce in the common mores of the workplace or society." See Gregory, *supra* note 81, at 748 (discussing the fact that courts feel that the more prevalent the sexism in the environment, the more difficult it is to have a case under Title VII and distinguishing this fact from the race context under Title VII).

<sup>158</sup> 510 U.S. 17, 21 (1993).

<sup>159</sup> See *id.*

<sup>160</sup> This argument was expressed in *Williams*. See *supra* notes 26-27 and accompanying text.



## B. *Non-Sex Behavior*

There are many reasons why a court should look at non-sex behavior when deciding a Title VII sexual harassment claim. First, the nature of harassment is not about sex, but about power. This means that any type of harassment in which power is asserted against women, sexual or not, is indeed sexual harassment.<sup>161</sup> Second, the broad purpose of Title VII is to protect against all forms of harassment whether or not the harassment is sexual in nature.<sup>162</sup> Third, Title VII was meant to help women to rise from their current social class, which means that a broad reading of Title VII is needed.<sup>163</sup> Fourth, in order to place sexual harassment claims under Title VII on par with racial harassment claims under Title VII, harassment that evinces an anti-female animus should be considered in a sexual harassment case, regardless of whether or not the harassment is sexual.<sup>164</sup>

### 1. *Nature of Sexual Harassment*

Non-sex behavior should be used in deciding hostile work environment sexual harassment cases because many forms of harassment keep women from being treated equally in the workplace. Harassment is not about sex, but power.<sup>165</sup> In this way, men in power who wish to assert their power will harass in a way that is not sexual.<sup>166</sup> Even though the conduct is not sexual and thus not punishable, the effect of the conduct will be the same: keeping women in their

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<sup>161</sup> See *infra* notes 165–67 and accompanying text.

<sup>162</sup> See *infra* note 168 and accompanying text.

<sup>163</sup> See *infra* notes 169–71 and accompanying text.

<sup>164</sup> See *infra* notes 172–74 and accompanying text.

<sup>165</sup> See Goleman *supra* note 74, at C12 (stating that “extensive research on . . . harassment” has shown that sexual harassment “has less to do with sex than with power”). See also Bhattacharyya, *supra* note 130, at 82. See also BUSS & MALAMUTH, *supra* note 130, at 54 (showing that sexual harassment is motivated by a combination of “sex, power, and conflict”). The author explains the power hypothesis of sexual harassment even though the author does not necessarily agree with the hypothesis. See *id.* at 55–57 (showing the power hypothesis proposition that “sexual aspects” of sexual harassment as “means to an end”—the end of asserting power). Power does have a role in sexual harassment because victims are more likely to get fired. See Michael V. Studd, *Sexual Harassment*, in *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES*, 54, 80 (David M. Buss & Neil M. Malamuth, eds., 1996).

<sup>166</sup> See Bhattacharyya, *supra* note 130, at 82 (“Harassment is a way of ensuring people who are already having a bad time are painfully aware of their predicament. It serves as a reminder of local power relations, while reproducing the same patterns.”).

place.<sup>167</sup> In this way, men in a position of power can give the same consequences to women without getting into trouble. Thus, Title VII will be of no effect in the long run if courts treat all non-sex behavior as unpunishable. The type of harassment will change to avoid consequences, but the effect on women will be the same; thus, Title VII will not protect any plaintiff from sexual harassment if non-sex behavior is not acknowledged.

## 2. *Broad Purpose of Title VII*

Including non-sex behavior in sexual harassment claims is within the spirit of Title VII. Title VII was designed to eliminate all types of discrimination in the workplace. Its broad purpose was to "strengthen and improve Federal Civil rights laws, deter unlawful harassment in the workplace, and to provide additional protections against unlawful discrimination in employment."<sup>168</sup> Neither Title VII nor its legislative history calls for banning a type of harassment from recognition. Title VII has a broad purpose which is ineffectual if a large number of harassing events are not taken into account. In this way, the purpose of Title VII is blunted unless non-sex behavior, which is a type of harassment in employment, is taken into account under a Title VII hostile work environment claim.

## 3. *Social Class of Women*

Again, the court system should be encouraging women to work and make the economy stronger.<sup>169</sup> Women faced with a decision to enter the work force will take the type of behavior that they receive from others into consideration when making this decision.<sup>170</sup> Women should not be held back from achieving success

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<sup>167</sup> See Goleman, *supra* note 74, at C1 (stating that harassment "is a way to keep women in their place; through harassment men devalue a woman's role in the work place by calling attention to her sexuality").

<sup>168</sup> Medina, *supra* note 131, at 312 (construing the Civil Rights Act of 1991 § 2, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 et seq. (1994))).

<sup>169</sup> Women can give "tremendous energy, creativity, persistence, and skill" to the labor market. See Needleman & Nelson, *supra* note 74, at 293.

<sup>170</sup> Women make job decisions by taking into account harassment which they will have to endure. See BRAVO & CASSEDY, *supra* note 9, at 47-48 (stating that sexual harassment victims "lose their jobs and settle for lower-paying ones" to avoid sexual harassment); Jamieson, *supra* note 150, at 100 (showing that women take precautions to avoid sexual harassment and rape because of fear); Aven Maguire, *Power: Now You See It, Now You Don't. A Woman's Guide to How Power Works*, in *DEFINING WOMEN: SOCIAL INSTITUTIONS AND GENDER DIVISIONS* 18, 24-25 (Linda McDowell & Rosemary Pringle, eds., 1992) ("Knowing that power can be exercised against [women] at every level, from the crudest to the most subtle, may be, quite simply, too daunting."); SKEGGS, *supra* note 74, at 162 ("Shame was produced as a result of

in the workplace, even if the harassment women must endure is only of a non-sexual nature. Courts should, thus, look to the effect of the discrimination and not just look to labels such as "sex" in sexual harassment. Harassment not only hurts women in the workforce, but hurts the United States' economy and well-being.<sup>171</sup> Harassment that has such a negative effect must be taken into account, and therefore, the courts should look at non-sex behavior that is damaging not only to individual plaintiffs, but to society in general.

#### 4. Putting Sexual Harassment on Par with Racial Harassment

Finally, racial discrimination and sexual harassment should be on an equal par since both are governed by Title VII. Plaintiffs in racial discrimination cases do not have the extra burdens that plaintiffs in sex discrimination cases have.<sup>172</sup> One of these burdens on plaintiffs in sexual harassment cases is that the harassment be "sexual in nature."<sup>173</sup> In racial harassment cases, the conduct does not have to be "racial in nature" but instead the conduct must just show an racial animus.<sup>174</sup> Because race and sexual harassment are both under Title VII, and because Title VII and its legislative history do not indicate that these types of

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[women's] consciousness of their 'place'—through the mismatch of their dispositions and positions.").

<sup>171</sup> BRAVO & CASSEDY, *supra* note 9, at 49–50 ("A typical Fortune 500 company with 23,750 employees loses \$6.7 million a year because of sexual harassment. . . . [S]exual harassment cost the federal government \$267 million between 1985 and 1987."); BUSS & MALAMUTH, *supra* note 130, at 79–80 ("With respect to employment consequences, we found that victims were discharged (i.e. fired) from employment in 40.2% of the cases, quit voluntarily in 47.8%, and experienced other employment consequences (e.g. not promoted) in 12% of cases."); Pierce, *supra* note 9, at 1071 (showing that sexual harassment affects victims physically and psychologically causing productivity to decline). The development of equal treatment for women will have "important implications for the nation's political, social, and economic health." Marshall & Paulin, *supra* note 146, at 33. Furthermore, the U.S. derives benefits from having a multi-cultural employment system. *Id.*

<sup>172</sup> See *supra* note 155.

<sup>173</sup> See George, *supra* note 72, at 32–33 (showing that another hoop for sexual harassment plaintiffs that racial harassment plaintiffs do not face is the requirement that behavior be sexual in nature). Racial harassment is found even if a supervisor used a non-racial term such as "dunce" to refer to all his black employees. See *id.* Therefore, the result should not be different in sexual harassment cases; if behavior is because of sex, it should be considered in a sexual harassment claim. See *id.* Further, one author illustrates that a case involving the word "nigger" against a black plaintiff was found to be harassing, while another case involving the word "bitch" against a female plaintiff was not found to be sexual in nature and thus not harassing. These comparable claims heard by the Seventh Circuit were treated in a different light. "The court in *Galloway* viewed the sexual epithet in a completely different light, embracing some of the same arguments of 'context' that had been dismissed in *Rodgers*." Gregory, *supra* note 81, at 760.

<sup>174</sup> See George, *supra* note 72, at 32–33.

harassment should be treated differently, sexual harassment needs to be put on a par with racial harassment. If a female is harassed because of her sex, regardless whether the conduct is "sexual in nature," a female should be able to bring a claim under Title VII with the same rights that are given to a racial harassment plaintiff.

## VII. CONCLUSION

The Sixth Circuit was correct when deciding the issues of work environment and non-sex behavior in *Williams*. Work environment should not be taken into consideration in sexual harassment claims, while non-sex behavior should be taken into account when looking at sexual harassment hostile work environment claims under Title VII.

Work environment should not be taken into consideration in a sexual harassment claim. By taking this stance, women will not be punished if they can only get lesser quality jobs.<sup>175</sup> Furthermore, this stance will allow the economy to become stronger by encouraging women to work.<sup>176</sup> If work environment is not looked at, all women will be protected under Title VII, regardless of social class,<sup>177</sup> and sexual harassment will be treated similarly to racial harassment in the court system.<sup>178</sup> Also, the court system can make sure that it is not enforcing a general civility code by the test given in *Harris v. Forklift Systems*.<sup>179</sup> In this way, the court system can ensure it meets the requirements given by the Supreme Court in hearing sexual harassment claims under Title VII while, at the same time, protecting women from the evils associated with taking the particular type of work environment into consideration.

Non-sex behavior should be considered in sexual harassment cases under Title VII. This is because harassment is about power and not about sexuality.<sup>180</sup> This means that any harassment that involves a power assertion should be looked at in a sexual harassment claim, regardless of whether the harassment is sexual in nature. Furthermore, Title VII was written in a broad spirit to combat all discrimination that evinces an anti-female animus.<sup>181</sup> It is also important to encourage women to work to make the economy stronger. If courts combat all types of harassment, women will feel safer when returning to work.<sup>182</sup> Another

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<sup>175</sup> See *supra* notes 145–49 and accompanying text.

<sup>176</sup> See *supra* notes 150–54 and accompanying text.

<sup>177</sup> See *supra* notes 148–149 and accompanying text.

<sup>178</sup> See *supra* notes 155–57 and accompanying text.

<sup>179</sup> See *supra* notes 158–60 and accompanying text.

<sup>180</sup> See *supra* notes 165–67 and accompanying text.

<sup>181</sup> See *supra* note 168 and accompanying text.

<sup>182</sup> See *supra* notes 170–71 and accompanying text.

reason why non-sex behavior should be looked at is the fact that racial harassment plaintiffs must only show that the harassment evinced an anti-racial animus and not that the words used were racial in nature.<sup>183</sup> In this way, non-sex behavior should be considered in order to put sexual harassment claims on par with racial harassment claims.

Therefore, other circuits should follow the lead of *Williams v. General Motors Corp.* by not taking a particular type of work environment into account and by considering non-sex behavior that shows “anti-female animus.” This allows all sexual harassment plaintiffs to be protected under Title VII, regardless of the type of powerful behavior imposed (sexual or non-sexual) and regardless of the type of work environment in which a plaintiff works.

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<sup>183</sup> See *supra* notes 172–74 and accompanying text.

